Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

LARRY EUGENE MOORE,

vs. *Petitioner,*

UNITED STATES OF AMERICA,

Respondent.

PHILIP A. McLAMB,

vs. *Petitioner,*

UNITED STATES OF AMERICA,

Respondent.

STEVEN LEE GREGORY,

vs. *Petitioner,*

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE: Did Congress intend to include the damage or destruction of a private residence within the coverage of 18 U.S.C. Sec. 844(i)?

QUESTION TWO: If this Court rules in *United States v. Tome*, 3 F.3d 342 (10th Cir. 1994), cert. granted, *Tome v. United States*, 114 S.Ct. 1048, that a prior consistent statement made after a motive to fabricate arose does not rebut a charge of recent fabrication or improper influence or motive under Fed. R. Evid. 801(d)(1)(B), will such a ruling apply to prior consistent statements only offered to rehabilitate the credibility of a witness who has been impeached?

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OPINIONS BELOW

This is a criminal case which was brought by the United States in the District Court of South Carolina where the Petitioners were convicted of 18 U.S.C. 371; five counts of mail fraud in violation of 18 U.S.C. 1341; two counts of violating the federal arson statute, and aiding and abetting that crime, in violation of 18 U.S.C. 844(i); and two counts of using a fire to commit a felony, and aiding and abetting that crime, in violation of 18 U.S.C. 844(h)(1). Petitioners Moore and McLamb were each convicted of one additional count of violating the federal arson statute, and aiding and abetting that crime, in violation of 18 U.S.C. 844(i), and one additional count of using fire to commit a felony, and aiding and abetting that crime in violation of 18 U.S.C. 844(h)(1). The unpublished judgments of the District Court appear in the Appendix. (App.16). The Petitioners appealed their convictions to the United States Court of Appeals for the Fourth Circuit which affirmed the convictions on June 10, 1994, and the unpublished opinion appears in the Appendix. (App.1). The Petitioners filed a Petition for Re-Hearing with a Suggestion for Re-Hearing *en banc* and on July 8, 1994, the Court of Appeals denied this petition and this unpublished order appears in the Appendix. (App.9).

JURISDICTION

The order denying the Petition for Re-Hearing was entered on July 8, 1994. This Court has jurisdiction under Title 28 U.S.C. §1254(1).

PROVISIONS OF LAW INVOLVED

The provisions of law involved are reproduced in the Appendix and are Article I, Sec. 8 of the United States Constitution which is the Commerce Clause (App.23), Title 18 U.S.C. 844(i) (App.24) and Federal Rules of Evidence 402 (App.25), 403 (App.26) and 801(d)(1)(B) (App.27).

STATEMENT OF THE CASE

The Petitioners were convicted of one count of conspiracy in violation of 18 U.S.C. 371; five counts of mail fraud in violation of 18 U.S.C. 1341; two counts of violating the federal arson statute, and aiding and abetting that crime, in violation of 18 U.S.C. 844(i); and two counts of using a fire to commit a felony, and aiding and abetting that crime in violation of 18 U.S.C. 844(h)(1). Petitioners Moore and McLamb were each convicted of one additional count of violating the federal arson statute, and aiding and abetting that crime, in violation of 18 U.S.C. 844(i), and one additional count of using fire to commit a felony, and aiding and abetting that crime in violation of 18 U.S.C. 844(h)(1).

All of the convictions stem from the attempted and ultimately successful burning for hire in 1987 of a residence in Myrtle Beach, South Carolina, so that the owner could receive insurance proceeds therefrom. The owner, Daniel A. Vogel, was convicted in separate proceedings. At trial, the government presented evidence that Petitioners tried several means to burn the house on three occasions, including plastic explosives, a flare gun and

large amounts of gasoline. The third attempt was successful and the residence was completely destroyed.

Facts relevant to the Question One: During the trial of the case, certain stipulations of fact were entered concerning the house that was the target of the arson.

It was stipulated, for instance, that the house was supplied with interstate telephone and gas lines; that the owner had used materials supplied through interstate commerce to renovate his home; his home was mortgaged by an institution that engaged in interstate commerce; and that it was insured by a company that engaged in interstate commerce. It was also stipulated that, at the time of the burning, the house was held as an asset under the authority of the United States Bankruptcy Court in North Carolina.

The United States District Court for the District of South Carolina, Charleston Division, concluded that the house was a building used in an activity affecting interstate commerce and, therefore, the motions by the defendant to dismiss for lack of federal jurisdiction was denied. The United States Court of Appeals for the Fourth Circuit issued its opinion on June 10, 1994, holding that the Vogel home was "used" in an activity affecting interstate commerce. It based its decision on the stipulation of facts and its recent opinion in *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994).

Ramey is a divided opinion on the very issue presented by this petition. *Ramey* involved, inter alia, the burning of a trailer, which was used as residence, in West Virginia. Because the trailer received electricity from a power grid supplied through interstate commerce, the

Fourth Circuit concluded that it was a building used in an activity affecting interstate commerce and that the prosecution was proper under 18 U.S.C. §844(i).

The Fourth Circuit relied upon the decision of this Court in *Russell v. United States*, 471 U.S. 858, 105 S.Ct. 2455 (1985). This case represents the only decision of the Supreme Court on the scope of §844(i). The language cited most often by the several circuits which have had to confront the issue of the jurisdictional limits, if any, of §844(i) is:

> In sum, the legislative history suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home.
>
> By its terms, however, the statute only applies to property that is "used" in an "activity" that affects commerce.

Id. at 862. 105 S.Ct. at 2457. The majority reasoned that a residence receiving electricity through an interstate source constitutes an activity affecting interstate commerce.

Judge Michael dissented from this conclusion, stating that "[t]he central question is: For what 'activity' is the trailer 'used'?" 24 F.3d at 610. He added that "electricity consumption is not the 'activity' for which the trailer is 'used.' " *Id.* He further observed that "[t]he Supreme Court and every circuit (except the Seventh and, today, ours) dealing with the issue has required at least some commercial tinge to the activity before holding that §844(i) applies.

The Fourth Circuit, therefore, based its decision in this case upon the precedent of a split panel decision of the circuit in *Ramey*. It is the reasoning and conclusion reached in *Ramey* that these petitioners must challenge now by this petition.

Facts relevant to Question Two – the Federal Rule of Evidence 801(d)(1)(B) question: The main witness for the government was Terry Norman who had been granted immunity in return for his testimony. Norman was one of the principals in the scheme and participated in the first two unsuccessful attempts. Norman was the first member of the conspiracy to have been arrested when in August 1989 he was arrested for an unrelated weapon's charge. After spending several months in jail on this unrelated charge, Norman decided to begin cooperating with law enforcement by confessing to all of his criminal activities in return for favorable treatment for the weapon's charges. (JA 126-132). None of the defendants in the case were, when Norman began his cooperation, suspects in the crime.

After reaching an agreement with the government, Norman was debriefed by government agents and told of his involvement in the arson and implicated all three Petitioners, Daniel Vogel, and two others: Norman's ex-girlfriend Allison Harbour and a former employee of Norman's, Dewey Blake Tilley.[1] (JA 382 & 417).

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[1] Harbour was convicted at trial but did not appeal. Tilley was given complete immunity in exchange for his testimony.

It was apparent from cross examination of Norman that he had powerful motives to fabricate the involvement of the Petitioners. His testimony against all three Petitioners saved him a substantial jail sentence (JA 135-138) and he had a personal motive to implicate Petitioner Gregory because he believed that Gregory and other members of the Hells Angels Motorcycle Club had abandoned him and stole his personal belongings while he was waiting in jail after his August 1989 arrest. He testified in a previous trial that he would get all of them, including Gregory. (JA 126-132 & 185-186).

After Norman's testimony, two ATF Agents were permitted to testify by the trial judge over the objection of the Petitioners that they had interviewed Norman at his debriefing and he had implicated the Petitioners in the scheme to burn the Vogel residence. (JA 382 & 417). The Petitioners appealed this ruling to the Court of Appeals asserting that because the statement was made at a time after a motive to fabricate by Norman arose, it was inadmissible under Fed. R. Evid. 801(d)(1)(B) because only those prior consistent statements made prior to the time a motive to fabricate are admissible.

The Court of Appeals found that the prior consistent statement by Norman was made to law enforcement officers after Norman had concluded an arrangement with the government (App.4) which was after the motive to fabricate arose. The Court ruled it was admissible, however, because it was not offered for the truth of the matter asserted but only to rehabilitate Norman's credibility after it had been impeached. In making this ruling, the Court of Appeals cited *United States v. Parodi*, 703 F.2d

768, 784-87 (4th Cir. 1983) which stands for the proposition that when prior consistent statements are admitted only to rehabilitate an impeached witness's statement and not for the truth of the matter asserted, the requirement that the prior consistent statement be made before a motive to fabricate arises (hereafter referred to as the Pre-Motive Requirement) does not apply to Fed. R. Evid. 801(d)(1)(B).

BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

This case was initiated by the United States by the filing of an indictment in the District Court for the District Court of South Carolina charging the Petitioners with violations of various criminal statutes as set out above. Jurisdiction in the District Court was via Title 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

The opinion of the Fourth Circuit in this case, as well as the opinion of that court in *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994), which provided the rationale for the conclusion reached in this case, are in direct conflict with the decision of at least one other, and perhaps several other, courts of appeals on the issue of whether 18 U.S.C. §844(i) covers the arson of a private home. This decision is also inconsistent with the legislative history of §844(i).

This conflict is a real inter-decisional one, and may well be repeated in this circuit as well as in other circuits. As will be shown below, the various circuits which have addressed the scope of §844(i) have stretched logic to its limits in endeavoring to ensure judicial support for the proposition that, in enacting §844(i), the fullest extent of Congressional power under the Commerce Clause is achieved.

There is, therefore, a need for this Court to grant the petition in order to decide a question raised, but not answered, in *Russell v. United States*, 471 U.S. 858, 105 S.Ct. 2455 (1985); namely, whether Congress intended to cover the arson of a private home under 18 U.S.C. §844(i)? By granting this petition and resolving the issue, this Court would bring about uniformity of decisions on the matter.

A. *Russell v. United States*

The decision of this Court in *Russell v. United States*, 471 U.S. 858, 105 S.Ct. 2455 (1985), represents the only Supreme Court case on the jurisdictional scope of the federal arson statute. 18 U.S.C. §844(i). In *Russell*, this Court stated that the language in §844(i) providing that it encompasses the arson of " 'any building . . . used . . . in any activity affecting interstate . . . commerce expresses an intent by Congress to exercise its full power under the Commerce Clause." *Id.* at 859. 105 S.Ct. at 2456.

The Court then reviewed in some detail the legislative history of §844(i) and stated:

> In sum, the legislative history suggests that congress at least intended to protect all business

> property, as well as some additional property that might not fit that description, but perhaps not every private home.

Id. at 862. 105 S.Ct. at 2457. The last clause in that quote has been read by some circuits to include private homes within the jurisdictional scope of §844(i).

Quite importantly, the Court instructed in *Russell,* that "[b]y its terms, however, the statute *only* applies to property that is 'used' in an 'activity' that affects commerce." *Id.* The panel of the Fourth Circuit in this case and a majority of the panel in *Ramey,* appear to have ignored this important lesson from *Russell.*

It should be kept in mind that §844(i) was enacted in 1970, during a period when there were many bombings that resulted from protests against the war in Vietnam. When a laboratory at a state university is bombed because research was being conducted that was related to the military, there was a federal interest involved, but that building and the activity conducted there, strictly speaking, might not qualify as "business." It certainly affected a federal commerce activity. A police station is another example. It is again, strictly speaking, not a building used in commerce, but the activity of the police affects commerce and, therefore, would be within the statute. The legislative history, however, reflects that at least some members of Congress were concerned about over-extending the jurisdictional scope of §844(i) if that statute were read as to include a private home.

B. The Fourth Circuit and §844(i)

The building involved in the present case was a private home. It was the home of one Daniel Vogel, who was tried and convicted of the same charge in separate proceedings. *United States v. Ramey,* 24 F.3d 602 (4th Cir. 1994), involved a trailer in West Virginia, which was also used as a private home. These two cases represent, therefore, what may be seen as the broadest extension of the jurisdictional scope of §844(i).

In *Ramey,* the trailer received electricity from a power grid supplied through interstate commerce. *Id.* at 607. The court phrased the jurisdictional issue by asking, inter alia, whether the fact that the trailer received electricity from an interstate power grid constitutes "uses" in an "activity" that affects commerce? *Id.* It answered the question in the affirmative, stating: "The class of activities not only 'affects' commerce, but is in fact the *raison d'tre* of an interstate business." *Id.*

The Fourth Circuit further reasoned in *Ramey* that "*Russell* implicitly rejected the rationale of a Second Circuit case . . . " *United States v. Mennuti,* 639 F.2d 107 (2d Cir. 1981). *Id.* As will be discussed below, Mennuti also involved the arson of a private home under §844(i).

Based upon the stipulations of fact in the district court and the reasoning in *Ramey,* the Fourth Circuit concluded in the present case that the government had established the requisite jurisdictional predicate to sustain the convictions.

Ramey was not, however, a unanimous decision on the critical jurisdictional issue. The dissent by Judge Michael shows the absurdity that can be reached through an extension of the reasoning of the majority in that case. *Id.* at 610 (Take the same trailer without the interstate utilities. The interstate nexus could be met by hunters who brought food to the cabin which had traveled in interstate commerce.)

Judge Michael cited *Mennuti* with approval. He believed that the central focus of a §844(i) analysis should be upon the "use" of the building as the statute appears to require. It must be "used" in an activity affecting interstate commerce to come properly within the scope of §844(i). "[E]lectricity consumption is not the 'activity' for which the trailer is used." *Id.*

Importantly, Judge Michael summed up the conflict on this issue by stating:

> The Supreme Court and every circuit (except the Seventh and, today, ours) dealing with the issue has required at least some commercial tinge to the activity before holding that Sec. 844(i) applies.

Id. at 611. He demonstrates, therefore, fairly clearly that there is a conflict among the circuits and perhaps between two circuits and the Supreme Court which this Court needs very much to resolve.

C. Other Circuits and §844(i)

Very recently, the Eighth Circuit rendered a split decision on the jurisdictional scope of §844(i). In *United States v. Ryan*, 9 F.3d 660 (1993), *vacated, reh'g en banc*

granted (1994. Jan. 5, 1994), the majority on the panel concluded that the Ryan Fun and Fitness Center, which had closed permanently and was owned by a resident of another state met the jurisdictional requirements of §844(i).

Chief Judge Arnold dissented. He began his discussion by agreeing with the majority that, in enacting §844(i), Congress intended to exercise its full power under the Commerce Clause. *Id.* at 675. He disagreed, however, with the majority stating: "[T]he Court bends this precedent out of shape to conclude that mere receipt of natural gas or out-of-state ownership, without any additional showing as to the use of the structure itself satisfies the activity requirement of Section 844(i)." *Id.* In Judge Arnold's view, "there must be a showing that there is 'some interstate character to the property involved.' " *Id.; quoting from United States v. Mayberry,* 896 F.2d 1117 (8th Cir. 1990).

There are two other cases which involved the burning of a private home. The first case ante-dates *Russell.* It is *United States v. Mennuti,* 639 F.2d 107 (2d Cir. 1981). In *Mennuti,* the Second Circuit concluded that Congress did not intend to include private residences within the coverage of §844(i). The other case is *United States v. Stillwell,* 900 F.2d 1104 (2d Cir. 1990). The holding in *Stillwell* is that a private residence, which is supplied with natural gas obtained from interstate sources, is within the scope of §844(i).

The Seventh Circuit in *Stillwell* criticized the Second Circuit's holding in *Mennuti,* suggesting that "the Supreme Court squarely rejected the rationale of *Mennuti*

in *Russell.*" *Id.* at 1109. These petitioners respectfully disagree with the Seventh Circuit on this.

In *Mennuti,* the Second Circuit affirmed the dismissal of the indictment against the defendants under §844(i) because, "[t]o the ordinary mind, the destruction of two private dwellings would not constitute the destruction of buildings *used* in interstate . . . commerce or in any activity affecting interstate . . . commerce." 639 F.2d at 109. That matter was not addressed in *Russell* and, therefore, *Mennuti* remains vital on that issue.

Petitioners have attached copies of recent cases decided by courts of appeals on the jurisdictional scope of §844(i) and will not belabor the Court with a further discussion in this petition in support or in distinction of the opinions in those cases. They would hope to be able to do this in their briefs should the Court grant their petition for a writ of certiorari.

D. Position of Petitioners

Petitioners respectfully submit that a review of the §844(i) cases very clearly demonstrates that "Section 844(i) is far from clear." *United States v. Ryan,* 9 F.3d at 674 (Arnold, C.J. dissent). This Court, however, in *Russell* recognized that the statute may not perhaps include every private home. The result achieved, however, by the decisions of the Fourth Circuit in this case and in *Ramey* would include every private home.

The legislative history discussed in *Russell* suggests that §844(i) was not intended to include private homes. Indeed, there was unopposed concern expressed in the

Report referred to in *Russell* that Congress might not have the constitutional authority to include private homes. To this end, the Fourth Circuit ignored a very important constitutional policy consideration in this case and in *Ramey*. This policy consideration was recognized by Chief Judge Arnold in his dissent in *Ryan*:

> [T]he Court's ruling disturbs the balance between the state and federal governments by allowing federal prosecutors to bring almost any arson prosecution – traditionally a state crime – without a clear expression of Congress' intent to do so.

9 F.3d at 675-76. Congress did not seem to have conveyed such a purpose, and, as this Court instructed in *United States v. Bass*, 404 U.S. 336, 339, 92 S.Ct. 515, 523 (1981), "unless Congress conveys its purpose clearly, it will not be deemed to have significantly altered the federal-state balance. . . . "

It is not being contested that Congress has very broad powers under the Commerce Clause. It does not follow, however, that the power of Congress to regulate under the Commerce Clause is limitless. As Chief Justice Rehnquist explained:

> [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 310, 101 S.Ct. 2352, 2391 (1981). This concern is one that has been expressed by the Court for many years. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624 (1937).

Recently, a district court, presented with the issue of whether §844(i) applies to the burning of a private home (and a private vehicle), concluded that "Congress was not authorized by the Commerce Clause, and, in any event, has not stated with sufficient clarity an intent, to federalize a residential arson like this." *United States v. Montgomery*, 815 F. Supp. 7, 11 (D.D.C. 1993). Judge Oberdorfer went on in *Montgomery* to state:

> [I]t is inconceivable that the Framers of the Commerce Clause or even the Congress that approved Section 844(i), contemplated that such a statute (originally aimed at protecting from attack by terrorists racketeers property substantially used in genuine interstate commercial activity) would be applied to convert into enclaves protected by federal criminal law every private home, ...

Id.

In *Montgomery*, the government proffered certain facts which it believed tended to demonstrate that the house and vehicle involved were used in interstate commerce. *Id.*, at n.6 and pp. 12-16. The court responded: "If the proffered facts can prove a federal crime within the meaning of the Commerce Clause and section 844(i) as construed in *Russell* and *Mennuti*, it is difficult to imagine

any rational and manageable limit on the application of that statute to an urban (or suburban) home, . . . " *Id.*

CONCLUSION

Petitioners fully appreciate the fact that Congress has broad powers under the Commerce Clause. The framers of our Constitution, however, were not inclined to eliminate the states in order to create one centralized system of government. In other words, there are limits to the power of Congress under the Commerce Clause.

Petitioners respectfully submit that the legislative history of §844(i) suggests fairly that Congress may not have seen its power as limitless and that concern was expressed that it might not have the constitutional authority to include the arson of a private home. The aim of §844(i) was not to eliminate arson as a state crime.

The Fourth Circuit in this case and *Ramey* augmented a conflict created by the Seventh Circuit in *Stillwell*. Petitioners respectfully submit that the reasoning of the Second Circuit in *Mennuti* has not been weakened by *Russell*. *Mennuti* represents the proper conclusion based upon a more insightful reading of the language and legislative history of §844(i). That statute should not be interpreted, as the Fourth Circuit has, to include all buildings, regardless of whether or not they are actually *used* in an activity that affects interstate commerce.

Petitioners would request that this Court apply the Rule of Lenity should it be held that all private residences are now within the scope of §844(i). *See, Rewis v. United*

States, 401 U.S. 808, 812, 91 S.Ct. 1056 (1971) (ambiguities in criminal statutes are to be resolved in favor of the defendant). The federal arson statute is ambiguous with respect to the very issue presented by this petition.

Finally, it is apparent that *Russell* left unanswered the question raised in it; namely, whether Congress intended to include a private home within the meaning of §844(i). The district and circuit courts have been wrestling with the issue for a number of years. Now, the Fourth Circuit has stretched the Commerce Clause to its maximum limits and, Petitioners submit, have gone beyond the range of appropriate constitutional reason in essentially holding that it applies to every building (and probably much more, given the list of other things covered under the statute). The aid of this Court is urgently needed to create a test for the limits of §844(i), in order to eliminate the conflict and create uniformity of decisions among the circuits.

QUESTION TWO

In accord with Supreme Court Rule 10.1(a), the Petitioners respectfully submit that this Court should grant the Petition because the Court of Appeals for the Fourth Circuit has rendered a decision in conflict with a decision of other United States Courts of Appeals on the issue presented herein.

In *United States v. Tome*, 3 F.3d 342 (10th Cir. 1993), *cert. granted, Tome v. United States*, 114 S.Ct. 1048, 127 L.Ed.2d 370 (1994), this Court granted *certiorari* for the following question: Whether a prior consistent statement

made after a declarant's motive to fabricate arose rebuts a charge of recent fabrication or improper influence or motive under Fed.R.Evid. 801(d)(1)(B). If this Court rules that such a prior consistent statement does not rebut a charge of recent fabrication or improper influence or motive, will such a ruling apply to such prior consistent statements offered only to rehabilitate a witness who has been impeached. The Petitioners submit that such a ruling should apply to all such prior consistent statements regardless of the reason they are being offered. There is a split of authority among the Circuit Courts of Appeal on this issue that should be resolved by this Court.

The Fourth Circuit ruled in this case that the Pre-Motive Requirement does not apply to prior consistent statements offered only for rehabilitation of an impeached witness's testimony (App.4). In another case, *United States v. Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), the Fourth Circuit has held that the Pre-Motive Requirement does apply to prior consistent statements offered as substantive evidence so that Fourth Circuit draws a distinction between statements offered for rehabilitation and those offered as substantive evidence. This distinction is in accord with holdings of other Courts of Appeal. *United States v. Brennan*, 798 F.2d 581, 587-588 (2d Cir. 1986); *United States v. Casoni*, 950 F.2d 893, 905-906 (3d Cir. 1991); *United States v. Harris*, 761 F.2d 394, 398-400 (7th Cir. 1985); *United States v. Demarrais*, 876 F.2d 674, 678 (8th Cir. 1989).

These decisions are in conflict with at least two other Courts of Appeal which hold that the Pre-Motive Requirement is but one, albeit crucial, factor in determining whether a prior consistent statement is admissible.

These cases draw no distinction between prior consistent statements offered as rehabilitation and those offered as substantive evidence. See *United States v. Miller*, 874 F.2d 1255, 1273 (9th Cir. 1989); *United States v. Montague*, 958 F.2d 1094, 1098-99 (D.C. Cir. 1992).

The problem with the Fourth Circuit cases and cases from other Circuits is that Fed.R.Evid. 801(d)(1)(B) admits all prior consistent statements as substantive evidence, see Advisory Committee Notes to 801(d)(1)(B) (App. 42); *United States v. Miller*, 874 F.2d 1255, 1272 (9th Cir. 1989), so "it no longer makes sense to speak of a prior consistent statement as being offered solely for the more limited purposes of rehabilitating a witness; any such statement is admissible as substantive evidence under Rule 801(d)(1)(B)." *Id.* at 1272.[2]

Not only is the reasoning of the decisions from these latter cases undermined by the fact that all prior statements are offered as substantive evidence under 801(d)(1)(B), the decisions of the Ninth and D.C. Circuits have much more logical appeal. It is these decisions that the Petitioners urge this Court to adopt.

The Court in *United States v. Miller*, 874 F.2d 1255, 1272 (9th Cir. 1989) discussed how other courts have admitted for rehabilitative purposes prior consistent statements made when a motive to fabricate existed but

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[2] Even the Seventh Circuit in *United States v. Harris*, 761 F.2d 394 (7th Cir. 1985), while holding that prior consistent statements offered only for rehabilitation are not subject to the pre-motive requirement, admitted that the "difference in purpose may seem unrealistically subtle in light of the effect a jury may be inclined to give the statements." *Id.* at 400.

have not admitted such statements as substantive evidence. The *Miller* Court rejected this distinction for two reasons:

> First, since the requirement of no motive to fabricate is rooted in the Rules 402 and 403 and not in the terms of 801(d)(1)(B), there is no basis for limiting the requirement to cases involving prior statements under Rule 801(d)(1)(B). Indeed, we fail to see how a statement that has no probative value in rebutting a charge of 'recent fabrication or improper motive,' see Fed. R.Evid. 801(d)(1)(B), could possibly have probative value for the assertedly more 'limited' purpose of rehabilitating a witness. If 'repetition does not imply veracity,' see *Harris*, 761 F.2d at 399, then proof of repetition cannot rehabilitate.
>
> Second, the distinction drawn by *Harris* and *Brennan* is inconsistent with the legislative history of Rule 801(d)(1)(B). Prior to the adoption of Rule 801(d)(1)(B), prior consistent statements were traditionally only admissible for the limited purpose of rebutting a charge of recent fabrication or improper influence or motive. See Fed.R.Evid. 801(d)(1)(B) advisory committee notes. The Rule goes one step further than the common law and admits all such statements as substantive evidence. *Id.* The Rule thus does not change the type of statements that may be admitted; its only effect is to admit these statements as substantive evidence rather than solely for the purpose of rehabilitation. Accordingly, it no longer makes sense to speak of a prior consistent statement as being offered solely for the purpose of rehabilitating a witness; any such statement is admissible as substantive evidence

> under Rule 801(d)(1)(B). In short, a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all. The distinction drawn by *Brennan* and *Harris* is therefore untenable.

874 F.2d at 1272.

Based on this reasoning, the Court in *Miller* went on to announce a rule that makes sense and treats the no motive to fabricate in a more flexible manner than other courts have dealt with it:

> The requirement should not be applied as a rigid per se rule barring all such prior consistent statements under Rule 801(d)(1)(B), without regard to other surrounding circumstances that may give them significant probative value. Indeed, our conclusion that the requirement emerges from the relevancy concerns of Rules 402 and 403 implies that trial judges should consider motivation to fabricate as simply one of several factors to be considered in determining relevancy – albeit a very crucial factor. Thus, the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant 'probative force bearing on the credibility apart from mere repetition.' (omit cite). This determination rests in the trial judge's sound discretion.

874 F.2d at 1274.

Applying this method of deciding admissibility to this case, it is clear that the prior consistent statements to the ATF Agents that the Petitioners were co-participants in the arson should not have been admitted. First for

consideration was the crucial factor of the motive to fabricate and in this case the circumstances of Terry Norman's statement implicating the Petitioners is important. He was a convicted felon at the time of his arrest by an ATF Agent in August 1989 and firearms were found in his house. (JA 158). His efforts at being released from jail failed: getting his daughter to lie at his bond hearing that the weapons belonged to her boyfriend did not work (JA 210-212) nor did his attempt to get others to take responsibility for the weapons. (JA 126-132). Cooperation with the Government was the only thing left and in order for that cooperation to be of any worth to the Government and, in turn, of any worth to him, he had to implicate others. This need to implicate others is the strong motive to fabricate when he made his arrangement with the Government with the assistance of his lawyer and implicated the Petitioners. There was an additional motive to fabricate the involvement of Petitioner Gregory which was that he and Norman were members of the Hells Angels and Norman swore revenge against several of his Hells Angels brothers including Gregory for not assisting him while he was in jail. (JA 230, 246-247).

Second for consideration was Terry Norman's history of subornation of perjury. He admitted during cross examination that he had convinced his daughter to lie at his bond hearing after he was arrested in August 1989 by having her claim that the guns found in his house by the police belonged to her boyfriend. (JA 210-212). He also attempted to have other members of the Hells Angels lie about who owned the guns which they refused. (JA 126-132).

Third for consideration was Terry Norman's admission that he had wanted a witness who implicated him in another crime silenced even if it meant killing him. (JA 243-245).

Fourth for consideration was Terry Norman's crime-filled life which made his credibility at least worthless. He admitted the following during cross examination: he made his living in the 1980s as a professional drug dealer making about thirty to forty thousand dollars per month when he was not in prison or overseas (JA 229-230); he sold drugs in prison (JA 227) and while out on appeal bond from a conviction for trafficking in cocaine (JA 227-228); he manufactured and sold LSD (JA 229) and used it over a hundred times and used methamphetamine seventy-five to a hundred times (JA 227); he admitted committing other arson including a rocket attack on a house in Winston-Salem, N.C. (JA 231).

If the rule in *United States v. Miller,* 874 F.2d 1255 (9th Cir. 1989) is adopted by this Court, there is no question that admitting the prior consistent statements to the two ATF agents would have been an abuse of discretion. Indeed, there is no factor which suggests why they should be admitted.

CONCLUSION

The Petitioners respectfully submit that the Petitioner should be granted and that this Court should resolve the conflict among the Circuits by adopting the logical and common sense approach of the Ninth Circuit in *Miller*.

Respectfully submitted,

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Counsel of Record
HOLLER, LENGEL, OLIVE & GARNER
P.O. Box 11006
Columbia, S.C. 29211
803-765-2968
Counsel for Larry E. Moore & Philip A. McLamb

MICHAEL P. O'CONNELL
Assistant Federal Defender
P.O. Box 876
Charleston, S.C. 29402
Counsel for Steven Lee Gregory

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LARRY EUGENE MOORE, *Defendant-Appellant.*	No. 93-5273
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. STEVEN LEE GREGORY, a/k/a Murdock, *Defendant-Appellant.*	No. 93-5274
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PHILIP A. McLAMB, *Defendant-Appellant.*	No. 93-5281

Appeals from the United States District Court
for the District of South Carolina, at Charleston.
David C. Norton, District Judge.

(CR-91-440-2)

Argued: April 13, 1994

Decided: June 10, 1994

Before WIDENER and LUTTIG, Circuit Judges, and TURK, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: James Hanjo Lengel, Columbia, South Carolina, for Appellants Moore and McLamb; Michael P. O'Connell, Assistant Federal Public Defender, Charleston, South Carolina, for Appellant Gregory. David S. Kris, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** J. Preston Strom, Jr., United States Attorney, Alfred W. Bethea, Assistant United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellants raise several challenges to their convictions and sentences stemming from involvement in the

arson of a private home in Myrtle Beach, South Carolina. We find that the challenges lack merit and therefore affirm the convictions and sentences.

I.

Appellants in this case – Larry Eugene Moore, Steven Lee Gregory and Philip A. McLamb – were convicted by a jury of one count of conspiracy in violation of 18 U.S.C. § 371; five counts of mail fraud and aiding and abetting that crime, in violation of 18 U.S.C. § 1341; two counts of violating the federal arson statute, and aiding and abetting that crime, in violation of 18 U.S.C. § 844(i); and two counts of using fire to commit a felony, and aiding and abetting that crime, in violation of 18 U.S.C. § 844(h)(1). Moore and McLamb were each convicted of one additional count of violating the federal arson statute, and aiding and abetting that crime, in violation of 18 U.S.C. § 844(i), and one additional count of using fire to commit a felony, and aiding and abetting that crime, in violation of 18 U.S.C. § 844(h)(1).

All of the convictions stem from the attempted and ultimately successful burning for hire of a residence in Myrtle Beach, South Carolina, so that the owner could receive insurance proceeds therefrom. The owner, Daniel A. Vogel, was convicted in separate proceedings. At trial, the government presented evidence that appellants tried several means to burn the house, including plastic explosives, a flare gun and large amounts of gasoline.

Appellants now raise a number of challenges to their convictions and the resulting sentences. Because the contentions involve different facts, the facts relevant to each

individual challenge are best related in the discussion of that particular challenge.

II.

Gregory individually raises four trial evidentiary issues and two sentencing issues. We review a district court's evidentiary decisions for an abuse of discretion. *United States v. Hassan El*, 5 F.3d 726, 731 (4th Cir. 1993). Review of the court's determinations under the Sentencing Guidelines is governed by 18 U.S.C. § 3742(e). If the issue turns primarily on a factual determination, as do both of the issues now before us, an appellate court should apply the "clearly erroneous" standard. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985).

A.

Gregory asserts that the district judge abused his discretion by allowing ATF agents to testify to prior consistent statements by Terry Norman. Prior consistent statements of a witness are not hearsay if "offered to rebut an express or implied charge of recent fabrication or improper influence or motive." Norman's credibility had been attacked prior to the presentation of the agent's testimony. Gregory argues, however, that the prior consistent statement must be made prior to when the alleged motive for fabrication arose. *See United States v. Weil*, 561 F.2d 1109, 1110-11 (4th Cir. 1977). In this instance, the prior statement was made to law enforcement officers after Norman had concluded an arrangement with the government. It is apparent that the statement was not

offered for the truth of the matter asserted, but to rehabilitate Norman's credibility after it had been impeached. *See United States v. Parodi*, 703 F.2d 768, 784-87 (4th Cir. 1983). Therefore, we find no abuse of the district judge's discretion in admitting Norman's prior consistent statement.

Gregory next claims that the district court abused its discretion by allowing Norman to testify that Gregory was involved in another arson with him that occurred subsequent to the Myrtle Beach burning, and then allowing an arson investigator to discuss the cause of the second fire. The district court admitted the evidence pursuant to Fed. R. Evid. 404(b) as relevant to the issue of intent and as evidence of a common scheme or plan. Recognizing that the defendant's plea of not guilty places his state of mind in issue, *United States v. McLamb*, 985 F.2d 1284, 1289 (4th Cir. 1993), Rule 404(b) evidence offered to prove mental state must be relevant, that is, sufficiently related to the charged offense. *United States v. Hernandez*, 975 F.2d 1035, 1039 (4th Cir. 1992). As the evidence went to another, similar arson, there is little doubt that it is relevant and necessary to the government's efforts to demonstrate that the defendant had the necessary intent to commit the present offense. *Id.* This evidence is particularly relevant to showing intent in the conspiracy charge since defendant asserted that he never agreed to commit arson.* Finally, appellant refused to

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* Appellant's claims that the government failed to provide notice must fail as the government did not intend to use this evidence: the issue was raised for the first time by a co-defendant during cross examination of Norman.

request a limiting instruction despite repeated invitations to do so. The district judge did not abuse his discretion in admitting this evidence.

Gregory objects to the district court's limitation of his cross examination of Tilley about whether Norman had called him from jail and told him to implicate Gregory in the arson. We see no abuse of discretion in limiting appellant's counsel to asking Tilley whether Norman had contacted him from the jail. Relying on *United States v. Katsougrakis*, 715 F.2d 769, 778-79 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), the judge found that appellant's counsel had no good faith basis in further exploring his theory, and therefore limited questioning after Tilley's denial that he had spoken to Norman from jail. It is well established that the extent and scope of cross examination are within the sound discretion of the trial judge. *Alford v. United States*, 282 U.S. 687, 694 (1931). We find no abuse of the district judge's discretion in limiting cross examination.

In response to a question about whether he had interviewed any of the individuals that Norman had told him were involved in the arson, an ATF agent testified, "Yes. I contacted Ted Warren and questioned him concerning what prospective defendants might want to talk to us." Gregory contends that this statement indirectly comments on his silence both before and during trial and places his character in evidence. We find this argument without merit. The test for determining whether an indirect remark constitutes improper comment on a defendant's failure to testify is whether the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a

comment on the failure of the accused to testify. *United States v. Whitehead*, 618 F.2d 523, 527 (4th Cir. 1980). We do not believe that there is even a remote likelihood that the jury interpreted this remark as a statement on appellant's failure to testify. Nor do we agree that the statement was intended to show Gregory's guilt by damaging his character in violation of Fed. R. Evid. 404(a). Appellant's conclusions are simply too tenuous.

B.

Gregory next raises two sentencing issues. He first attacks the district court's decision not to group the two separate arsons of Vogel's house. Sentencing Guidelines § 3D1.2 provides that separate counts "involving substantially the same harm" shall be grouped together for purposes of sentencing. Under Section 3D1.2(b), separate transactions connected by a common criminal objective or constituting part of a common scheme or plan" involve substantially the same harm. Gregory argues that there was only one victim within the meaning of § 3D1.2, Aetna Surety and Casualty Co. Further, Gregory argues that the two arsons constituted one common scheme or plan; to defraud Aetna by destroying the residence. The sentencing judge disagreed, reasoning that the two arsons created separate risks of harm: "I think there are two separate break-ins; there's two separate risks of harm involved in breaking in this house and attempting to burn it down." The district court obviously assessed the individual risks which were associated with the separate break-ins.

Whether separate counts should be grouped together under § 3D1.2(b) is a heavily fact-specific determination. For example, two counts of rape of the same victim on different occasions are not grouped together. U.S.S.G. § 3D1.2, Application Note 4, example 4. In contrast, one count of auto theft and one count of altering the stolen car's vehicle identification number are grouped. *Id.*, example 3. In this case, the circumstances are similar to the guideline example of multiple rapes of the same victim. There were multiple, separate risks of harm involved in the two arsons, not one composite harm. Accordingly, the district court's refusal to group these counts was note clearly erroneous.

Finally, Gregory contends that the district judge improperly increased his guidelines offense level. U.S.S.G. § 2K1.4(b)(1) permits the court to increase the guideline level if the defendant knowingly created a substantial risk of death or serious bodily harm. The district judge found that the burning of Vogel's home created such a risk to neighbors and firefighters. It is the creation of risk, not the actual consequences of the defendant's action, that triggers the enhancement under § 2K1.4(b)(1). Vogel's neighbors and the firefighters who responded to the fire were all placed in substantial personal risk because of the rapid burning of the gasoline soaked home. One neighbor testified that his house was not damaged out of mere fortuity:

> The wind was blowing out toward the ocean somewhat south, which was right away from our house. And the normal breeze of course is from the ocean to the shore. And if it had been

> that, I'm afraid my house would have gone up, too.

The district court's finding that Gregory created a substantial risk of death or serious bodily harm was thus not clearly erroneous.

III.

Moore, McLamb and Gregory jointly raise two legal issues which we review *de novo.* First, defendants assert that the government failed to prove that the Vogel residence was used in an activity that affects interstate commerce as required in 18 U.S.C. § 844(i). The following facts were stipulated to at trial: the house was connected to interstate gas and telephone lines, Vogel had utilized materials that had moved in interstate commerce to renovate the house, an out of state bank held a mortgage on the house, the house was then being marketed for sale in several states, the house was an asset being held under the authority of the United States Bankruptcy Court in North Carolina, and at the time of the fire, the house was insured by an out of state insurance company. In *United States v. Ramey,* ___ F.3d ___, ___(4th Cir. May 17, 1994) (No. 93-5178, Slip Opinion at 6-7), we held that connection of a house to an interstate power grid constitutes a sufficient use in an activity that affects commerce to satisfy the arson statute. The government has therefore shown that the Vogel residence was used in an activity that affects interstate commerce.

Appellants next challenge the sufficiency of the evidence to sustain their convictions on the mail fraud counts. We cannot disturb the verdicts if, considering the

evidence in a light most favorable to the government, we conclude that any rational trier of fact could have found that the elements of the crime had been proved beyond a reasonable doubt. *United States v. Vogt*, 910 F.2d 1184, 1193 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). Appellants ignore the fundamental tenet of conspiracy law that a defendant is liable for the substantive crimes of his co-conspirators when those crimes are reasonably foreseeable and in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). The mail fraud clearly was both foreseeable and in furtherance of the conspiracy because the impetus of the conspiracy from the beginning was to defraud the insurance company. Thus, as co-conspirators, all of the defendants were liable for mail fraud even though they did not individually submit claims to Vogel's insurance company. *See United States v. Cummings*, 937 F.2d 941, 944-45 (4th Cir.), *cert. denied*, 112 S.Ct 395 (1991).

IV.

Finally, McLamb claims that he withdrew from the conspiracy. He asserts that he was dismissed from the conspiracy by the affirmative act of others. However, a defendant has the burden of demonstrating withdrawal from a conspiracy by proving an affirmative act communicating the withdrawal to his co-conspirators. *United States v. United States Gypsum Co.*, 438 U.S. 422, 464 (1978). There was sufficient evidence that he remained a member of the conspiracy throughout and was entitled to a share of the insurance proceeds. Thus he did not demonstrate withdrawal and remained liable for the overt acts of his co-conspirators. *See Pinkerton*, 328 U.S. at 647.

V.

Finding no merit in any of appellants' assignments of error relating to their convictions or sentences, the judgment of the district court is hereby affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5273
CR-91-440-2

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LARRY EUGENE MOORE

Defendant - Appellant

No. 93-5274
CR-91-440-2

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

STEVEN LEE GREGORY, a/k/a Murdock

Defendant - Appellant

No. 93-5281
CR-91-440-2

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

PHILIP A. MCLAMB

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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(Filed July 8, 1994)

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES DISTRICT COURT

_____ District of SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA

V.

LARRY EUGENE MOORE

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
2:91-440-2
(Filed Mar. 24, 1993)
Jack B. Swerling
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[x] was found guilty on count(s) one, two, three, four, five, six, seven, eight, nine, ten, eleven and twelve after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	see Indictment filed 10-3-91	10-3-91	1
18:1341 and 2	" "	10-3-91	2 thru 6
18:844(i) and 2	" "	11-22-87	7,9,11
18:844(h)(1) and 2	" "	11-22-87	8,10,12

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $600.00 , for count(s) one thru twelve , which shall be due [ ] immediately [x] as follows: in accordance with Bureau of Prisons Financial responsibility program.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
237-64-8768
Defendant's Date of Birth:
10-27-42
Defendant's Mailing
Address:
536 Clayton Road
Durham, North Carolina
27703
Defendant's Residence
Address:

March 10, 1993
Date of Imposition
of Sentence
/s/ Illegible
Signature of
Judicial Officer
David C. Norton,
U.S. District Judge
Name & Title of
Judicial Officer
Illegible

Defendant: LARRY EUGENE MOORE

Case Number: 2:91-440-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 48 months as to counts 1,2,3,4,5,6,7,8,9, and 11. As to Counts 10 and 12, the defendant is also sentenced to 48 months. These sentences to run concurrent to each other.

[x] The court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated at the FCI, Butner, N.C. That the defendant *not* be housed with co-defendants, Daniel A. Vogel or Steven Gregory.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ____ a.m. p.m. on _____ .
[ ] as notified by the United States marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
[x] before 2 p.m. on July 12, 1993 .
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____, with a certified copy of this judgment

_____

United States Marshal

Defendant: LARRY EUGENE MOORE
Case Number: 2:91-440-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of (2) two years as to counts 7, 8, 9 and 11. The defendants is also placed on supervised release as to counts 1, 2, 3, 4, 5, 6, 10, 12 for (3) three years. These terms to run concurrent.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the

term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The defendant shall not possess a firearm or destructive device.

1) The defendant shall submit to urinalysis testing and if deemed appropriate by the US Probation Officer, participate in an inpatient/outpatient substance abuse treatment program.

2) The defendant shall pay any remaining special assessment fee, which shall be due within 90 days of his release from incarceration.

3) The defendant shall pay the costs of supervision (which amounts to $115.30 per month)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record of personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendants compliance with such notification requirement.

Defendant: LARRY EUGENE MOORE
Case Number: 2:91-440-2

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: III

Imprisonment Range: 87 to 108 months

Supervised Release Range: 2 to 3 years

Fine Range: $15,000 to $150,000

[x] Fine is waived or is below the guideline range, because of the defendant's inability to pay. Restitution: $1,675,420.71

[x] Full restitution is not ordered for the following reason(s): Co-defendant, Daniel Vogel is to make full restitution.

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[x] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

UNITED STATES DISTRICT COURT

_____ District of SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA

V.

STEVEN LEE GREGORY

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
2:91-00440
(Filed Mar. 22, 1993)
Michael P. O'Connell, AFPD
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[x] was found guilty on count(s) 1-6 and 9-12 on March 5, 1992 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	See the Indictment	October 3, 1991	1
18:1341 and 2	See the Indictment	October 3, 1991	2-6
18:844(i) and 2	See the Indictment	November 22, 1987	9 and 11
18:844(h)(1) and 2	See the Indictment	November 22, 1987	10 and 12

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $500.00, for count(s) 1-6 and 9-12, which shall be due [ ] immediately [x] as follows: While incarcerated, in accordance with Bureau of Prisons financial responsibility program.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
241-98-2451
Defendant's Date of Birth:
8/29/56
Defendant's Mailing Address:
4400 Ben Lane
Walkertown, N.C. 27105
Defendant's Residence Address:

March 10, 1993
Date of Imposition of Sentence
/s/ Illegible
Signature of Judicial Officer
DAVID C. NORTON,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer
March 19, 1993

Defendant: STEVEN LEE GREGORY
Case Number: 2:91-00440

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months as to each of counts 1-6. Said sentences to run concurrently. As to counts 9-12, the defendant is hereby committed to the United States Bureau of Prisons to be imprisoned for a term of eighty-four (84) months as to each count. Said sentence to run concurrently with each other and with sentence imposed in counts 1-6.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant be committed to the Federal Correctional Institution, Butner, N.C.

[x] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States Marshall for this district.

  a.m.
  [ ] at ___ p.m. on _____ .
  [ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
  [ ] before 2 p.m. on _____ .
  [ ] as notified by the United States marshal.
  [ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ , at _____ with a certified copy of this judgment

_____

United States Marshal

By _____

Defendant: STEVEN LEE GREGORY
Case Number: 2:91-00440

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years as to counts 9 and 11. As to Counts 1-6, 10 and 12, a term of three (3) years. All terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[x] The defendant shall not possess a firearm or destructive device.

1. The defendant shall pay any remaining special assessment fee, which shall be due within 90 days of his release from incarceration.

2. The defendant shall submit to urinalysis testing and, if deemed appropriate by the U.S. Probation Officer, participate in inpatient/outpatient substance abuse treatment program.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: STEVEN LEE GREGORY
Case Number: 2:91-00440

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: III

Imprisonment Range: 78 to 97 months

Supervised Release Range: 2 to 3 years

Fine Range: $12,000 to $125,000

[x] Fine is waived or is below the guideline range, because of the defendant's inability to pay. Restitution: $_____

[ ] Full restitution is not ordered for the following reason(s): _____

[x] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

UNITED STATES DISTRICT COURT

_____ District of SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA

V.

Philip A. McLamb

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
2:91-440
(Filed Mar. 24, 1993)
William O. Kneece
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[x] was found guilty on count(s) on March 5, 1992 by jury as to Counts 1 thru 12 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	See Indictment	4/7/89	1
18:1341 & 2	" "	4/7/89	2-6
18:844(i) & 2	" "	11-22-87	7,9,11
18:844(h)(1) & 2	" "	11-22-87	8,10,12

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $600.00 , for count(s) 1 thru 12 , which shall be due [ ] immediately [x] as follows: in accordance with Bureau of Prisons financial responsibility program.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
245-76-6326
Defendant's Date of Birth:
5/29/51
Defendant's Mailing Address:
4317 Rogers Road
Durham, NC 27703
Defendant's Residence Address:
Same as above

March 10, 1993
Date of Imposition of Sentence
/s/ Illegible
Signature of Judicial Officer
David C. Norton,
United States
District Judge
Name & Title of Judicial Officer
March 24, 1993

Defendant: McLamb, Philip A

Case Number: 2:91-440

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty (30) months as to Counts 1 thru 6 and thirty (30) months, as to Counts 7 thru 12; sentence on each count imposed to run concurrently.

[x] The court makes the following recommendations to the Bureau of Prisons:

Commitment recommended to Federal Correctional Institution in Butner, N. C.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ____ a.m. / p.m. on _____.
[ ] as notified by the United States marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[x] before 2 p.m. on July 12, 1993.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment

_____

United States Marshal

Defendant: McLamb, Philip
Case Number: 2:91-440

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years; term consists of term of two (2) years on counts 7, 8, 9 and 11 and a term of three (3) years on counts 1, 2, 3, 4, 5, 6, 10 and 12; said terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the

term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The defendant shall not possess a firearm or destructive device.

Special conditions of release: (1) Defendant pay any remaining special assessment fee within the first 30 days of release from incarceration; (2) Defendant to participate in inpatient/outpatient substance abuse treatment, to include urinalysis testing, as deemed appropriate by the United States Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendants compliance with such notification requirement.

Defendant: McLamb, Philip A.
Case Number: 2:91-440

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 25

Criminal History Category: I

Imprisonment Range: 57 to 71 months

Supervised Release Range: 2 to 3 years

Fine Range: $10,000 to $3,350,841.42

[x] Fine is waived or is below the guideline range, because of the defendant's inability to pay. Restitution: $1,675,420.71

[x] Full restitution is not ordered for the following reason(s): Court determined restitution is to be paid by co-defendant only.

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[x] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3

The Commerce Clause

The Congress shall have power. . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . .

18 U.S.C. § 844

* * *

(h) Whoever –

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000 or both; and if personal injury results to any person, including any public safety officer performing

duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more than $20,000 or both; and if death results to any person, including any public safety oficer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 84 of this title.

* * *

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

waste of time, or needless presentation of cumulative evidence.

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if –

> **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

* * *

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

* * *

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule, they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

* * *

No. 94-642

Supreme Court, U.S.
FILED
JAN 9 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

LARRY EUGENE MOORE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the private residence involved in this case was used in an activity affecting interstate commerce within the meaning of the federal arson statute, 18 U.S.C. 844(i).

2. Whether the district court erred in admitting evidence of a witness's prior consistent statement for the limited purpose of rehabilitating that witness's credibility after it had been impeached on cross-examination.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-642

LARRY EUGENE MOORE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is unpublished, but the judgment is noted at 25 F.3d 1042 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1994. A petition for rehearing was denied on July 8, 1994. Pet. App. 12-13. The petition for a writ of certiorari was filed on October 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of conspiring to violate the federal arson statute, to commit mail fraud, and to use fire to commit a felony, in violation of 18 U.S.C. 371; five counts of mail fraud and of aiding and abetting that crime, in violation of 18 U.S.C. 1341 and 2; two counts of violating the federal arson statute and of aiding and abetting that crime, in violation of 18 U.S.C. 844(i) and 2; and two counts of using fire to commit a felony and of aiding and abetting that crime, in violation of 18 U.S.C. 844(h)(1) and 2. Petitioners Moore and McLamb were each convicted on one additional count of violating the federal arson statute and of aiding and abetting that crime, in violation of 18 U.S.C. 844(i) and 2, and one additional count of using fire to commit a felony and of aiding and abetting that crime, in violation of 18 U.S.C. 844(h)(1) and 2. Petitioner Moore was sentenced to 48 months' imprisonment, to be followed by three years of supervised release, and ordered to pay $1,675,420.71 in restitution. Petitioner McLamb was sentenced to 30 months' imprisonment, to be followed by three years of supervised release, and ordered to pay $1,675,420.71 in restitution. Petitioner Gregory was sentenced to 84 months' imprisonment, to be followed by three years of supervised release. Pet. App. 14-37. The court of appeals affirmed. *Id.* at 1-11.

1. Daniel A. Vogel wanted to burn down his house in Myrtle Beach, South Carolina, so that he could collect the proceeds of his fire insurance. Vogel contacted petitioner Moore and asked him to find someone to burn down the house. Moore was in business with petitioner McLamb and Charles Terry Norman, and the three of

them agreed to burn down the house for $100 ?00. Gov't C.A. Br. 4.

Moore, McLamb, and Norman attempted to burn down the house, but they were unsuccessful. Norman then spoke to petitioner Gregory, and Gregory agreed to help burn down Vogel's house. Norman and Gregory then attempted to burn down the house, but they too were unsuccessful. Finally, Gregory succeeded in burning Vogel's house to the ground. Gov't C.A. Br. 5-6.

2. At trial, petitioners stipulated that at the time of the arson, Vogel's house was connected to interstate gas and telephone lines, the house had been renovated with materials obtained through interstate commerce, the house was subject to a mortgage held by a bank outside South Carolina, the house was being marketed for sale outside South Carolina, the house was under the control of a Bankruptcy Court outside the State, and the house was insured by an out-of-state insurance company. Pet. App. 9. The district court determined that those facts established that Vogel's residence was used in an activity affecting interstate commerce within the meaning of the federal arson statute, 18 U.S.C. 844(i).

Norman testified for the government pursuant to a plea agreement. He recounted the terms of the conspiracy and the attempts to burn down Vogel's house. On cross-examination, petitioners tried to suggest that Norman was lying about the arson in return for having received a lenient sentence under his plea agreement. In response, the government called two agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) who testified that Norman had previously told them that petitioners had been involved in the arson. When petitioners objected to the testimony, the government explained that the evidence was being offered to

rehabilitate Norman's credibility. The district court admitted the evidence. Gov't C.A. Br. 16-17.

3. The court of appeals affirmed. Pet. App. 1-11. After reciting the stipulated facts bearing on the connection of the Vogel residence to interstate commerce, the court noted that it had held in *United States* v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), petition for cert. pending, No. 94-5755, that the "connection of a house to an interstate power grid constitutes a sufficient use in an activity that affects commerce to satisfy the arson statute." Pet. App. A9. "The government has therefore shown," the court concluded, "that the Vogel residence was used in an activity that affects interstate commerce." *Ibid.*

The court also rejected Gregory's argument that Norman's prior consistent statement to the ATF agents was not admissible because it was made after Norman's alleged motive to fabricate evidence against petitioners arose. Pet. App. A4. The court noted that the prior statement "was made to law enforcement officers after Norman had concluded an arrangement with the government." *Ibid.* It found, however, that "the statement was not offered for the truth of the matter asserted, but to rehabilitate Norman's credibility after it had been impeached." *Id.* at A4-A5. Accordingly, the court concluded that there was "no abuse of the district judge's discretion in admitting Norman's prior consistent statement." *Id.* at A5.

ARGUMENT

1. Petitioners contend (Pet. 7-17) that Vogel's residence was not used in an activity affecting interstate commerce within the meaning of the federal arson statute, 18 U.S.C. 844(i). That contention is without merit.

In *Russell* v. *United States*, 471 U.S. 858 (1985), this Court held that the reference in Section 844(i) to "'any building * * * used * * * in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." *Id.* at 859. Under that standard, the Court concluded that Section 844(i) reaches all business property. *Id.* at 862. The Court did not suggest, however, that Section 844(i) is limited to business property. To the contrary, the Court indicated that Section 844(i) applies to private residences as well, so long as those residences are within the reach of Congress's power to regulate interstate commerce. *Ibid.*

Applying that analysis, the Fourth Circuit held in *United States* v. *Ramey*, *supra*, that a residence that receives electricity from an interstate power grid falls within the scope of Section 844(i). 24 F.3d at 607. The court explained that even though an individual residence may consume only a small amount of energy, "its consumption, combined with that of all similarly situated buildings, has a most definite effect on interstate commerce." *Ibid.* That aggregate effect, the court held, is sufficient to bring the entire class of residences within the reach of Congress's commerce power. *Ibid.*

In *United States* v. *Stillwell*, 900 F.2d 1104, cert. denied, 498 U.S. 838 (1990), the Seventh Circuit reached the same conclusion. Relying on *Russell*, the court held that "Congress intended [Section 844(i)] to cover all properties it has the power to reach under the commerce clause." *Id.* at 1110. The court then held that Congress has power under the Commerce Clause to reach private residences that receive interstate natural gas. *Id.* at 1111. The court explained that "Congress could rationally believe that, in the aggregate, arson of private

residences supplied with interstate natural gas has more than a *de minimis* effect on interstate commerce." *Ibid.*

Since Vogel's residence was connected to interstate gas and telephone lines, this case fits squarely within the rationale of *Ramey* and *Stillwell*. Unlike those cases, however, application of Section 844(i) does not depend on that connection to interstate commerce alone. As the court of appeals in this case noted, there were several additional factors showing that Vogel's residence was used in an activity affecting interstate commerce: the house had been renovated with materials that had moved in interstate commerce, an out-of-state bank held a mortgage on the house, the house was being marketed for sale in several States, the house was being held under the authority of an out-of-state Bankruptcy Court, and the house was insured by an out-of-state insurance company. Pet. App. A9.

The fact that the house was being marketed for sale in several States is particularly significant. In *Russell*, this Court held that "[t]he rental of real estate is unquestionably * * * an activity" that affects interstate commerce within the meaning of Section 844(i). 471 U.S. at 862. The sale of real estate is similarly an activity that unquestionably affects interstate commerce. Indeed, in one respect, this case presents a stronger nexus with interstate commerce than the building in *Russell* because the Vogel house was being marketed on the interstate real estate market, while the apartment building in *Russell* was being rented in a local market. *Ibid.*

Petitioners assert (Pet. 13) that the court's decision in this case conflicts with *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981). That asserted conflict does not warrant this Court's review. In *Mennuti*, the Second Circuit held that Section 844(i) applies only to

residences used for commercial purposes. *Mennuti*, however, was decided before this Court's decision in *Russell* made clear that Section 844(i) also applies to private residences, so long as Congress has the power to reach them under the Commerce Clause. As the court of appeals in *Ramey* explained, "*Russell*'s holding that the full commerce power is exercised in § 844(i) saps *Mennuti* of any vigor." 24 F.3d at 607. See also *Stillwell*, 900 F.2d at 1109 ("We believe the Supreme Court squarely rejected the rationale of *Mennuti* in *Russell*."). The Second Circuit has not revisited the scope of Section 844(i) since *Russell*, and there is no reason to believe that it would adhere to *Mennuti* today.

Petitioners also seek to rely on the Eighth Circuit's decision in *United States* v. *Ryan*, 9 F.3d 660 (1993), but as petitioners note (Pet. 11-12), that decision has been vacated. The Eighth Circuit has now issued its en banc decision in that case. *United States* v. *Ryan*, No. 92-1357 (Oct. 31, 1994). In that decision, the Eighth Circuit held that a district court did not commit plain error in instructing the jury that a temporarily closed commercial rental property that receives natural gas from outside the State falls within the scope of Section 844(i). Slip op. 11-12. Because the court reviewed the district court's instruction under the plain error standard, the court had no occasion to decide the precise scope of Section 844(i), even in the context of commercial property. *Id.* at 12. And because *Ryan* involved commercial property, it did not address the circumstances in which a private residence would be covered by Section 844(i). *Id.* at 8, 12. *Ryan* is therefore not instructive here.

2. Petitioners contend (Pet. 17-18) that the district court erred in admitting Norman's prior consistent statement implicating them in the arson because the statement was made after Norman's alleged motive to lie

arose. The question whether prior consistent statements offered as substantive evidence to rebut a charge of improper motive may be admitted pursuant to Fed. R. Evid. 801(d)(1)(B) without a showing that the statements were made before the motive to fabricate arose is currently before the Court in *Tome* v. *United States*, No. 93-6892 (argued Oct. 5, 1994).*

That question is not presented here, however, because Norman's prior consistent statement was offered to rehabilitate his credibility, not as substantive evidence. See Pet. App. 4-5. As petitioners concede (Pet. 18), every circuit that has adopted the pre-motive rule has also held that it does not apply where (as here) the prior consistent statement is admitted to rehabilitate a witness's credibility, rather than as substantive evidence. See *United States* v. *Casoni*, 950 F.2d 893, 905-906 (3d Cir. 1991); *United States* v. *DeMarrias*, 876 F.2d 674, 678 (8th Cir. 1989); *United States* v. *Brennan*, 798 F.2d 581, 587-588 (2d Cir. 1986); *United States* v. *Harris*, 761 F.2d 394, 399-400 (7th Cir. 1985); *United States* v. *Parodi*, 703 F.2d 768, 784-785 (4th Cir. 1983). Those decisions reason that a prior consistent statement offered for rehabilitation does not implicate the hearsay rule because it is not being offered for the truth of the matter asserted in the statement. See Fed. R. Evid. 801(c). Thus, the statement need not be admitted under Rule 801(d)(1)(B). Instead, such a statement is admissible if it is relevant to

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* As we argued in our brief in *Tome*, Rule 801(d)(1)(B) does not contain a "pre-motive" requirement. The language of the Rule says nothing about the timing of the statement as a prerequisite to its admissibility, and a pre-motive rule would be inconsistent with the basic philosophy underlying the Federal Rules of Evidence, which is to permit the trier of fact to consider all relevant evidence. We are providing petitioners with a copy of our brief in *Tome*.

rehabilitate the witness's credibility. Fed. R. Evid. 402. See, *e.g.*, *Brennan*, 798 F.2d at 588 ("[A] prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition.").

Petitioners argue (Pet. 18-21) that those decisions conflict with *United States* v. *Miller*, 874 F.2d 1255, 1272-1273 (9th Cir. 1989), which rejected a distinction between statements offered as substantive evidence and statements offered for purposes of rehabilitation. But *Miller* also rejected a pre-motive rule. *Id.* at 1273-1274. Under *Miller*, the timing of the statement is "simply one of several factors to be considered in determining relevancy." *Id.* at 1274. *Miller* therefore provides no support for petitioners' claim that Norman's prior statement should have been excluded because it was made after Norman's motive to lie arose.

Petitioners argue (Pet. 21-23) that they should prevail even under the more flexible relevancy standard adopted in *Miller*. Petitioners, however, did not make that argument in the court of appeals. Petitioners' sole contention was that Norman's prior statement was inadmissible because it was made after the motive to fabricate arose. Appellants' C.A. Br. 14-16. The question whether the statement is admissible under the more flexible *Miller* standard is therefore not properly before this Court. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). Moreover, since the resolution of that question is fact-bound and would affect only the parties to this case, it does not warrant this Court's review in any event.

Nor is there any need to hold this petition pending resolution of the issue presented in *Tome*. Even if this Court were to decide in *Tome* that Rule 801(d)(1)(B) contains a pre-motive requirement, it would not affect

the outcome in this case. Consistent with the courts of appeals that have found a pre-motive requirement in the Rule, the court below held that a prior consistent statement, if relevant, is admissible apart from the Rule to rehabilitate a witness whose credibility has been impeached. As we noted in our brief in *Tome* (Br. 45 n.24), the Court's resolution of the pre-motive issue should not affect that principle.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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